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INFORMATIONAL LETTER - #16

TO: County Patient's Rights Advocates and Other Interested Parties

FROM: The Office of Patients' Rights

RE: Capacity Hearings- Notification and Filing of the Petition

DATE: May 18, 2003

This Informational Letter addresses the procedures which must be followed when a facility files a capacity hearing concerning the administration of antipsychotic medications including requirements that the hearing petition and determination following the hearing be filed in the superior court and the timelines for holding such hearings.

Background

In 1991, The California legislature enacted SB 665 to implement the California Supreme Court decision in *Riese v. St Mary's Hospital*¹. At the core of the *Riese* decision is the legal presumption that people detained for mental health treatment are competent to make decisions concerning their medical care. The *Riese* decision and SB 665 (which amended the Welfare and Institutions Code) addressed the right of individuals held in psychiatric facilities under LPS to give informed consent to medication including the right to refuse; the procedures to be followed if a facility determines that an individual is not competent to consent (i.e. capacity hearings) and the conditions warranting emergency administration of medications.

¹ *Riese* recognized that persons detained pursuant to Welfare & Institutions Code § 5150 or 5250 have a right to give or refuse consent to medication.

Summary of Welfare and Institutions Code Procedures

Welfare & Institutions Code § 5332 states that antipsychotic medications² may be administered only after disclosure of the person's right to refuse and obtaining the person's informed consent.³ If the person does not refuse that medication or does not give other indications of refusal, the medication may be administered. Once a person has indicated refusal, legal proceedings must be initiated prior to the administration of the medication, absent an emergency.⁴ These procedures are called a capacity hearing.

Welfare & Institutions Code § 5333 states that persons subject to capacity hearings pursuant to section 5332 shall have a right to representation by a patients' rights advocate or legal counsel, and that ***petitions for capacity hearings must be filed with the superior court.*** The treatment facility also has the responsibility to deliver a copy of the notice of the filing of the petition for a capacity hearing to the person who is the subject of the petition and their advocate or counsel. In addition, upon delivery, the facility has the obligation to inform the person of his or her legal right to a capacity hearing, including the right to the assistance of the patients' rights advocate or an attorney in order to prepare for the hearing and to answer any questions or concerns regarding the filing of the petition. As soon thereafter an attorney or patients' rights advocate shall meet with the person to prepare for the hearing.⁵

Once the petition has been filed with the courts, it shall;

Be heard within 24 hours of that filing whenever possible.

If the any party needs additional time to prepare for the hearing, it can be postponed for 24 hours.

In extreme cases or hardship, hearings may be postponed for an additional 24 hours.⁶

² Welfare & Institutions Code § 5008 (l): "Antipsychotic medication" means any medication customarily prescribed for the treatment of symptoms of psychoses and other severe mental and emotional disorders.

³ Welfare & Institutions Code §§ 5152(c) and 5213(b) set forth the requirements for informed consent.

⁴ "Emergency" means a situation in which action to impose treatment over the person's objection is immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first gain consent. It is not necessary for harm to take place or become unavoidable prior to treatment. However, only the antipsychotics needed to treat the emergency condition can be administered.

⁵ Welfare & Institutions Code §5333(d).

⁶ As determined pursuant to local policy developed by the county mental health director and the presiding judge of the superior court regarding the scheduling of hearings. The policy shall specify procedures for the prompt filing and processing of petitions to ensure that the deadlines set forth in this section are met, and shall take into consideration the availability of advocates and the treatment needs of the patient

In no event shall a capacity hearing be held beyond 72 hours of the filing of the petition.⁷

Capacity hearings are to be held at the facility where the person is receiving the mental health treatment. The location within the facility must be compatible with and impose the least amount of disruption to the person's treatment.⁸

The hearing officer must be one of the following:

- A Superior Court Judge,
- A court-appointed commissioner, or
- A court-appointed referee, and

They must be appointed by the Superior court from a list that has been unanimously approved by;

- A panel composed of the local mental health director,
- The county public defender and,
- The county counsel or,
- The district attorney designated by the county board of supervisors.

All hearing officers must have received training in the issues specific to capacity hearings.⁹

At the conclusion of the capacity hearing the person who is the subject of the hearing shall be told of the decision. As soon as it is practicable, the person, their counsel or advocate, and the director of the facility where the person is receiving treatment shall be provided with written notification of the capacity determination, which shall include a statement of the evidence relied upon and the reasons for the determination. ***A copy of the determination shall be submitted to the superior court.***¹⁰ The person who is the subject of the capacity hearing may appeal the determination to the superior court or the court of appeal. The filing of the appeal will not prohibit the treatment from being administered pending the hearing of the appeal. A writ of habeas corpus pursuant to Section 5275 may also be filed.

⁷ Welfare & Institutions Code §5334.

⁸ Welfare & Institutions Code §5334(b).

⁹ Welfare & Institutions Code §5334(c).

¹⁰ Welfare & Institutions Code §5334(d).

Determination and administration of the person's incapacity to refuse treatment with antipsychotic medication shall remain in effect only for the duration for the detention period or until the capacity has been restored or by court determination, whichever is sooner. A finding of incapacity should only apply to the particular antipsychotic medication and conditions supporting its forced administration; in order to administer different antipsychotic medications or continue the forced administration of a medication when circumstances indicate the person may have regained his or her capacity, patients' rights advocates or legal counsel should require the facility to petition for a new capacity hearing.

Reference:

Welfare & Institutions Code §§ 5332 – 5337; § 5008; and § 5150 *et seq.*,
Riese v. St. Mary's Hospital (1987) 209 Cal. App.3d 1303; 243 Cal Rptr. 241)

Note:

County advocates should consult with legal counsel designated by the county to represent and or advise the advocate, often referred to as County Counsel.